ABLEMERGE (M) SDN BHD

v.

EMVILLE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[SUIT NO: S2-22-86-1999]
22 SEPTEMBER 2000

ARBITRATION: *Stay of proceedings - Application for - Entry of unconditional appearance to proceedings - Whether amounted to taking a step in proceedings under s. 6 Arbitration Act 1952 - Whether defendant precluded from seeking order for stay*

CIVIL PROCEDURE: *Stay of proceedings - Stay of proceedings pending arbitration - Entry of unconditional appearance - Whether amounted to taking a step in proceedings under s. 6 Arbitration Act 1952 - Whether defendant precluded from seeking order for stay*

CIVIL PROCEDURE: *Judicial precedent - Court of Appeal - Conflicting decisions - Whether previous decision per incuriam - Whether acceptable as binding authority*

The plaintiff, after having fulfilled a contract to construct and complete certain works for the defendant, claimed for payment of the outstanding balance. After the defendant filed its memorandum of appearance, the plaintiff took out a summons for summary judgment against the defendant. The defendant then applied for and was granted a stay in proceedings. The plaintiff appealed against this decision with the contentious issue being whether the entry of an unconditional appearance by the defendant amounted to taking a step in the proceedings within the meaning of s. 6 of the Arbitration Act 1952 ('the Act'), which would have then precluded the defendant from seeking an order for a stay of proceedings.

Held:

[1] In the case of *Accounting Publications Sdn Bhd v. Ho Soo Furniture Sdn Bhd*, it was held that an unconditional appearance filed before moving the court for a stay did not amount to taking any step in the proceedings under s. 6 of the Act. Since that decision was not *per incuriam* – which it would have been had s. 6 of the Act had not been considered at all – the subsequent differing decision in the factually similar case of *Interscope Versicherung Sdn Bhd v. Sime Axa Assurance Berhad & Anor* could not

have departed from it. The decision in *Accounting Publications Sdn Bhd v. Ho Soo Furniture Sdn Bhd* was therefore accepted as binding authority on the present case.

[Appeal dismissed.]

Case(s) referred to:

Accounting Publications Sdn Bhd v. Ho Soo Furniture Sdn Bhd [1999] 1 CLJ 765 ***(foll)***
Cheah Wai Poh v. Chin Brothers & Co Ltd [1958] MLJ 215 ***(refd)***
Duke v. Reliance Systems Ltd [1987] 2 WLR 1225 ***(refd)***
Government of Malaysia v. Lim Kit Siang; United Engineers (M) Berhad v. Lim Kit Siang [1988] 1 CLJ 219 ***(refd)***
Hashim Majid v. Param Cumaraswamy & Ors [1993] 2 MLJ 20 ***(refd)***
Huddersfield Police Authority v. Watson [1947] 2 All ER 193 ***(refd)***
Interscope Versicherung Sdn Bhd v. Sime Axa Assurance Berhad & Anor [1999] 2 CLJ 843 ***(not foll)***
Lee Brothers Construction Co v. Teh Teng Seng Realty Sdn Bhd [1988] 1 MLJ 495 ***(refd)***
Morelle Ltd v. Wakeling [1955] 1 All ER 708 ***(refd)***
Seong Fatt Sawmills Sdn Bhd v. Dunlop Malaysia Industries Sdn Bhd [1984] 1 CLJ 291 ***(refd)***
Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat (t/a Juta Bena) [1996] 1 CLJ 231 ***(refd)***
The Avro International [1988] 1 All ER 564 ***(refd)***
The "Dong Moon" Trans Asia Shipping Co Ltd v. "Dong Moon" Owners & Ors [1979] 1 MLJ 152 ***(refd)***
Trans Resources Corp Sdn Bhd v. Sanwell Corp & Anor (No 2) [1999] 3 CLJ 215 ***(refd)***
Usahabina v. Anuar Yahya [1998] 2 CLJ Supp 131 ***(refd)***
Wilkinson v. Barking Corp [1948] 1 All ER 564 ***(refd)***
Young v. Bristol Aeroplane Company Ltd [1944] 1 KB 718 ***(foll)***

Legislation referred to:

Arbitration Act 1952, s. 6
Rules of the High Court 1980, O. 12 rr. 6, 7

Arbitration Act 1950 [UK], s. 4(2)

For the appellant - Tan Lee Eng; M/s Chan Leong & Co
For the respondent - Mohamed Haniff Khatri Abdulla; M/s Haniff & Rajendran

Reported by Suresh Nathan

JUDGMENT

RK Nathan J:

Facts

By way of letters of award respectively dated 11 March 1996 and 28 June 1996 issued on behalf of the defendant to the plaintiff, the plaintiff had undertaken to construct and complete the following works on behalf of the defendant subject to the terms and conditions therein contained:

(a) Construction and Completion of Earthworks for the Proposed Residential, Commercial and Golf Course Development on Lots PT 567 and PT 603, Mukim Setul, Daerah Seremban, Negeri Sembilan Darul Khursus (the first project).

(b) Construction and Completion of Earthworks for the TNB Main Intake Sub-station, Reserve and Reservoir R1 and R2 on part of Lot 603, Mukim Setul, Daerah Seremban, Negeri Sembilan Darul Khusus (the second project).

The plaintiff has since completed the works under the first project and the second project. As for the first project, the plaintiff claimed that the defendant has failed, neglected and/or refused to release the retention sum of RM213,191. As for the second project, both the plaintiff and the defendant have agreed and have signed on a final account, certifying that a sum of RM1,859,599.69 is due and payable to the plaintiff from the defendant. In respect of Certificate of Payment No. ABM/9 dated 27 November 1997, the defendant has paid to the plaintiff a sum of RM50,000 as part payment leaving an outstanding balance of RM203,016.55. In addition, the defendant has not made any payment towards settlement of the outstanding sums due and payable under Certificate of Payment No. ABM/10 dated 8 June 1998 and the final account.

In view of the circumstances, the plaintiff claimed against the defendant for the recovery of the outstanding sums in respect of the final project and the second project as follows:

First Project	**Amount (RM)**
(a) Retention sum	213,191.00
Second Project	
(b) The outstanding balance under Certificate of Payment No. ABM/9 dated 27.11.97	203,016.55
(c) The outstanding sum under Certificate of Payment No. ABM/10 dated 8.6.98	209,794.18

(d) The outstanding sum under the Final Account	1,859,599.69
Total	2,485,601.42

On 12 March 1999 the defendant filed its memorandum of appearance. On 25 March 1999, the plaintiff took out a summons for summary judgment against the defendant. On 26 March 1999 the defendant took out a summons (encl. 7) seeking to strike out the writ of summons and the statement of claim as well as for stay of proceedings. The learned senior assistant registrar made an order on 10 June 1999 for the stay of further proceedings. The plaintiff now appeals against that decision of the learned senior assistant registrar. The defendant has entered an unconditional appearance before taking out the summons for, *inter alia*, stay of proceedings.

The Issue

The issue in this appeal is whether the entry of an unconditional appearance amounts to taking a step in the proceedings within the meaning of s. 6 of the Arbitration Act 1952 (the Act), which precludes the defendant from now seeking an order for stay of proceedings.

Findings Of The Court

In *Interscope Versicherung Sdn Bhd v Sime Axa Assurance Berhad & Anor* [1999] 2 CLJ 843 the Court of Appeal held that the entry of an unconditional appearance did indeed constitute the taking of a step in the proceedings within the meaning of s. 6 of the Act. Gopal Sri Ram JCA arrived at this conclusion by adopting the reasoning of Augustine Paul JC (as he then was) in the case of *Usahabina v. Anuar bin Yahya* [1998] 2 CLJ Supp 131. Augustine Paul JC was of the view that taking a step in the proceedings was an act which involved both the defendants' submission to the jurisdiction of the court and an election to allow the action to proceed. His Lordship was of the view that where the appearance was conditional, it did not amount to submission to the jurisdiction of the court and an application might be made to challenge the jurisdiction of the court. On the contrary he held that the effect of an unconditional appearance was a waiver of any irregularity that there might be and thus a submission to the jurisdiction of the court. His Lordship further held that the filing of an unconditional appearance would mean that the defendant had elected to allow the action to go on and had accordingly submitted himself to the jurisdiction of the court. In arriving at the above conclusion, his Lordship departed from the earlier cases such as *Lee Brothers Construction Co v. Teh Teng Seng Realty Sdn Bhd* [1988] 1 MLJ 495, *Cheah Wai Poh v. Chin Brothers & Co Ltd* [1958] MLJ 215, *The "Dong Moon" Trans Asia Shipping Co Ltd v. "Dong Moon" Owners & Ors* [1979] 1 MLJ 152 and *Hashim bin Majid v. Param Cumaraswamy & Ors* [1993] 2 MLJ 20.

There are two reasons given by his Lordship for such departure:

(a) Firstly, those cases were anchored upon English law (s. 4(2) of the English Arbitration Act 1950) which was so worded as specifically to exclude appearance as a step in the proceedings. The relevant part of the provision reads as follows:

> … any party to those proceedings may at any time **after appearance,** and before delivering any pleading or taking any other steps in the proceedings, apply to that court to stay the proceedings … (emphasis added)

He held that the words "after appearance" were absent in s. 6 of our Arbitration Act 1952 and thus those English cases and cases decided based on the English principle are distinguishable and should not be followed.

(b) Secondly, it was not appropriate to rely on *Wilkinson v. Barking Corporation* [1948] 1 All ER 564 wherein Asquith LJ stated as follows:

> The Supreme Court may by statute lack of jurisdiction to deal with a particular matter … It has however jurisdiction to decide whether or not it has jurisdiction to deal with such matters and by entering an unconditional appearance a litigant submits to the former jurisdiction (which exists) but not to the latter (which does not exist).

He reasoned that *Wilkinson v. Barking Corporation* was concerned with a matter over which the Court had no jurisdiction and entry of unconditional appearance did not amount to a submission to the jurisdiction of the Court for the plain reason that it did not exist.

His Lordship then chose to follow the case of *The Avro International* [1988] 1 All ER 564 and held that as the court in *Usahabina* has jurisdiction to hear the matter, entry of unconditional appearance amounts to a submission to the jurisdiction of the court.

In *Trans Resources Corp Sdn Bhd v. Sanwell Corp & Anor (No. 2)* [1999] 3 CLJ 215 I had with respect disagreed with the decision of my learned brother Augustine Paul JC (as he then was) and gave my reasons. I was totally unaware at the time I gave my decision, nor was I referred by counsel, to the decision of the Court of Appeal in *Interscope* which upheld the decision in *Usahabina*. In the circumstances, when this same issue arose in this case I was bound by the decision in *Interscope* and thus allowed the plaintiff's appeal. The result was that the stay of proceedings pending reference to arbitration had been lifted. In the exercise of my discretion, I did not allow costs as my decision to allow the appeal rested solely on the basis of the binding principle of *stare decisis*. It is also important to state that my said order had not as yet been perfected, according to the court file.

In *Trans Resources* I had held that the entry of a conditional appearance pursuant to O. 12 rr. 6 and 7 of the Rules of the High Court 1980 (the RHC) is only available to cases where:

(a) the defendant complains of an irregularity or defect in the originating process or service of the originating process upon him; and/or

(b) the defendant alleges that the court is without jurisdiction to deal with the dispute.

In respect of the two grounds relied on by Augustine Paul JC I had this to say at p. 225:

> In my view neither of the two criteria relied upon by Augustine Paul JC are applicable to a section 6 application since the Court's jurisdiction can never be contractually ousted by parties to a contract. This reasoning is solidly propounded by Gopal Sri Ram JCA in the Federal Court decision of *Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat (t/a Juta Bena)* [1996] 1 CLJ 231 where his Lordship said at p. 237 as follows:
>
> > At common law, a prior agreement between contracting parties to refer their disputes to arbitration did not operate to bar either of them from instituting proceedings in the ordinary courts. Neither did such a clause preclude the court from entertaining a suit filed in breach of the contract to arbitrate. However, the court could, in the exercise of its discretion, stay an action and require a plaintiff to adhere to the obligation voluntarily undertaken to go to arbitration. The judicial philosophy behind this approach is based upon sound principle. It is this. Since consent cannot confer jurisdiction upon a court which has none, there can be no consensual ousting of a court's jurisdiction to hear and determine disputes between litigants. See *Inter Maritime Management Sdn Bhd v. Kai Tai Timber Co Ltd, Hongkong* [1995] 4 CLJ 164.

I further held at p. 227:

> In the circumstances, based on the rationale in *Tan Kok Cheng (supra)* there can be no question of the parties consensually ousting the court's jurisdiction to hear and determine disputes between them.

Further down at p. 228 I held:

> To my mind, the entering of an unconditional appearance cannot amount to a waiver of the defendant's right to proceed to arbitration on the basis that the plaintiff's filing of the civil suit herein does not amount to either an irregularity or a defect in the writ or service thereof and in opposing the action it has not been the 1st defendant's contention that the court has no jurisdiction to deal with the dispute.

It is unfortunate that when the Court of Appeal decided on *Interscope* it was not referred to the decision of the Federal Court in *Tan Kok Cheng & Sons Realty Co Sdn Bhd.*

There is yet another decision of the Court of Appeal itself that seems to be in conflict with its decision in *Interscope*. I am referring to *Accounting Publications Sdn Bhd v. Ho Soo Furniture Sdn Bhd* [1999] 1 CLJ 765. Although the decision in *Accounting Publications* was delivered on 19 November 1997 compared to *Interscope,* which was delivered on 21 April 1999, yet unfortunately the decision in *Accounting Publications* was not referred to the Court of Appeal when it delivered its decision in *Interscope*. The factual matrix of both the cases were similar in that there was an unconditional appearance filed by the applicant before moving the respective courts of first instance for an order to stay proceedings under s. 6 of the Act. This is what the Court of Appeal said in *Accounting Publications* at p. 780:

> The second point made by counsel for the plaintiff in resisting this appeal is that the defendant had taken a step in the action before making its application for a stay and, like the respondent in *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd* [1995] 2 CLJ 345, is precluded from relying upon the arbitration clause. We have carefully examined the relevant chronology of events in this matter as well as the steps taken by both parties to the litigation and find that there is really no merit in the argument of plaintiff's counsel.
>
> The writ in the present case was issued on 20 June 1996. The defendant, after entering an appearance, took out its summons for a stay of proceedings on 16 July 1996. The defendant then delivered its defence and counterclaim on 13 November 1996. We are therefore of the view that the defendant did not take any step in the proceeding before moving the court for a stay. Indeed, we draw support for our view from the decision in *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* ([1994] 2 CLJ 716) where a similar contextual fact pattern did not deter the Supreme Court from ordering a stay of the action.

It is clear therefore that this passage is in conflict with the Court of Appeal's decision in *Interscope*. It has been accepted by the Court of Appeal in *Accounting Publications* that an unconditional appearance filed before moving the court for a stay did not amount to taking any step in the proceedings. In *Young v. Bristol Aeroplane Company Limited* [1944] 1 KB 718 Lord Greene MR on delivering the judgment of the Court of Appeal said at pp. 729/730 as follows:

> On a careful examination of the whole matter we have come to the clear conclusion that this court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarize: (1) The court is entitled and bound to decide

> which of two conflicting decisions of its own it will follow. (2) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. (3) The court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam.*

It is clear that based on *Bristol Aeroplane Company Limited* the Court of Appeal must give reasons for going against its earlier decision in *Accounting Publications*. Unfortunately the decision in *Accounting Publications* was not even referred to the Court of Appeal for it to consider. As has been said repeatedly it is the paramount duty of counsel to thoroughly research the law and assist the court to arrive at a just decision. It is not the duty of the court to do its own research in every case for otherwise there would be no need for advocates, because litigants need only to present their problems to the judge who can, based on his own research, make a reasoned decision. But that cannot be the law. It is incumbent and indeed it is the onerous duty of every counsel to present to the court before whom he is appearing, his copious and extensive research in support of his case. Anything short is tantamount to abdicating one's duty as an advocate to his client and as an officer of the court, to the court.

In any case even applying the principles as set out in *Bristol Aeroplane Company Limited,* for the later Court of Appeal in arriving at its decision in *Interscope* to depart justifiably from its own earlier decision in *Accounting Publications,* its reasoning must fall within any of the laid out three exceptions as stated in *Bristol Aeroplane Company Ltd.* It is beyond dispute that the first two of the exceptions in *Bristol Aeroplane Company Limited* do not exist at all since at no material time prior to the decision in *Interscope* were there two or more conflicting decisions of the Court of Appeal nor was there a prior Federal Court decision to contradict *Accounting Publications*. Therefore it leaves only the issue whether the Court of Appeal in delivering its decision in *Accounting Publication*s was *"per incuriam"*.

"Per Incuriam"

In *Huddersfield Police Authority v. Watson* [1947] 2 All ER 193 Lord Goddard CJ in delivering the judgment of the Court of Appeal said at p. 996 as follows:

> What is meant by giving a decision *per incuriam* is giving a decision when a case or a statute has not been brought to the attention of the court and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute.

Sir Raymond Evershed MR faced with the same question as to the meaning of *"per incuriam"* had, in his speech on behalf of the Court of Appeal said in *Morelle Ltd v. Wakeling* [1955] 1 All ER 708 as follows at p. 718:

> We have been unable to accept this argument. As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided *per incuriam* must, in our judgment, consistently with the *stare decisis* rule which is an essential feature of our law, be, in the language of Lord Greene, M.R., of the rarest occurrence.

Therefore it is an obvious deduction from these two authorities that for a decision of an earlier Court of Appeal to be *"per incuriam"* it must be shown to the satisfaction of a later Court of Appeal that the decision of the earlier Court of Appeal was made in ignorance or in forgetfulness of some earlier binding authority or statute.

Having considered s. 6 of the Act in delivering its decision as to whether the filing of an unconditional appearance amounts to "a step in the proceedings" could therefore the decision in *Accounting Publications* be said to be *"per incuriam"* since the Court of Appeal in arriving at that decision had no opportunity to consider the rationale and the reasoning as canvassed and subsequently decided by Augustine Paul JC in *Usahabina*. In other words if the Court of Appeal in *Accounting Publications* would have decided otherwise had the rationale and the reasoning in *Usahabina* been canvassed before it, could it then mean that *Accounting Publications* was decided *"per incuriam"*. To answer this question it is necessary to look at the words of Sir John Donaldson MR when he delivered his speech in the Court of Appeal in *Duke v. Reliance Systems Ltd* [1987] 2 WLR 1225 at p. 1228. This is what his Lordship said:

> I have always understood that the doctrine of *per incuriam* only applies where another division of this court has reached a decision in the absence of knowledge of a decision binding upon it or a statute, and that in either case it has to be shown that, had the court had this material, it must have reached a contrary decision. That is *per incuriam*. I do not understand the doctrine to extend to a case where, if different arguments had been placed before it or if different material had been placed before it, it might have reached a different conclusion. That appears to me to be the position at which we have arrived today.

The above quote was clearly approved by our then Supreme Court in the *Government of Malaysia v. Lim Kit Siang; United Engineers (M) Berhad v. Lim Kit Siang* [1988] 1 CLJ 219 wherein Eusoffe Abdoolcader SCJ, in delivering his speech (despite being a dissenting speech with regard to the subject matter of the appeal) said at p. 262 as follows:

> … And as to the decision being *per incuriam*, I would suggest that before any argument on this line is ever to be raised, it would be highly instructive to first refer to the latest observation in this regard by Sir John (now Lord) Donaldson M.R. in the English Court of Appeal in *Duke v. Reliance Systems Ltd* ([1987] 2 WLR 1225) (at p. 1228):

His Lordship then quoted the passage reproduced above.

Therefore coming back to the initial question, that is, assuming that *Usahabina* was rightly decided with regard to the interpretation given by it in respect of s. 6 of the Act, can it then be said that the decision of the Court of Appeal in *Accounting Publications* was *"per incuriam"* because it may have wrongly interpreted s. 6 of the Act? The answer to my mind is a clear NO because even if *Associated Publications* was decided wrongly in concluding that an unconditional appearance is accepted under s. 6 of the Act in order for the decision of the Court of Appeal in *Accounting Publications* to be *"per incuriam"* it must be shown that the court had failed to consider s. 6 of the Act at all. It is not sufficient to say that it was *"per incuriam"* mainly on the ground that it had wrongly interpreted s. 6 of the Act. It therefore follows that the decision of the Court of Appeal in *Accounting Publications* is not (emphasis provided) *"per incuriam"*. In the circumstances the Court of Appeal in *Interscope* could not be said to overrule or disregard its own prior decision in *Accounting Publications.*

Therefore it must follow, that the Court of Appeal in *Interscope* could not have, based on the accepted principles, departed from its earlier decision in *Accounting Publications*. In the circumstances, I am, with the greatest respect, not bound by the decision of the Court of Appeal in *Interscope* and accept as binding upon me the decision of the Court of Appeal in *Accounting Publications.*

In the circumstances, having had the benefit of reading all the authorities, and having taken time over this matter, I have come to the conclusion that my oral decision given on 29 October 1999, wherein I had allowed the plaintiff's appeal, was totally wrong. I therefore hereby withdraw my order given on 29 October 1999 since the said order has not been perfected. There is high authority for me to withdraw my earlier order and to substitute with the present order (see *Seong Fatt Sawmills Sdn Bhd v. Dunlop Malaysia Industries Sdn Bhd* [1984] 1 CLJ 291 FC). It is my judgment therefore that this appeal must stand dismissed with costs.